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No. 88-1681

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MICHAEL PATRICK KEEHAN,
Petitioner

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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of the Disciplinary Board of the
Supreme Court of Pennsylvania

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I. COUNTER-STATEMENT OF QUESTIONS PRESENTED

SHOULD THE COURT DENY CERTIORARI TO REVIEW THE PETITIONER'S RECIPROCAL DISBARMENT BY THE SUPREME COURT OF PENNSYLVANIA WHERE:

A. THE PETITIONER'S PETITION FOR RECONSIDERATION TO THE PENNSYLVANIA SUPREME COURT WAS NOT TIMELY FILED AND HIS PETITION FOR WRIT OF CERTIORARI WAS NOT FILED WITHIN NINETY DAYS OF THE ORDER OF DISBARMENT?

B. THE ISSUES RAISED IN THE PETITION FOR WRIT OF CERTIORARI WERE NOT RAISED, ARGUED OR CONSIDERED IN THE RECIPROCAL DISCIPLINARY PROCEEDINGS BEFORE THE PENNSYLVANIA SUPREME COURT?

TABLE OF CONTENTS

	Page
I. COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
II. TABLE OF CONTENTS	ii
III. TABLE OF AUTHORITIES	iv
IV. COUNTER-STATEMENT ON JURISDICTION	1
V. COUNTER-STATEMENT OF THE CASE	2
A. MARYLAND DISCIPLINARY PROCEEDINGS	2
B. PENNSYLVANIA RECIPROCAL DISCIPLINARY PROCEEDINGS	3
C. PETITION FOR RECONSIDERATION	4
D. PETITION FOR WRIT OF CERTIORARI	6
VI. SUMMARY OF ARGUMENT	8
VII. ARGUMENT	10
A. THE COURT SHOULD DENY CERTIORARI TO REVIEW THE PETITIONER'S RECIPROCAL DISBARMENT BY THE SUPREME COURT OF PENNSYLVANIA WHERE THE PETITIONER'S PETITION FOR RECONSIDERATION TO THE SUPREME COURT OF PENNSYLVANIA WAS NOT TIMELY FILED AND HIS PETITION FOR WRIT OF CERTIORARI WAS NOT FILED WITHIN NINETY DAYS OF THE ORDER OF DISBARMENT	11
B. THE COURT SHOULD DENY CERTIORARI TO REVIEW THE PETITIONER'S	

TABLE OF CONTENTS – *(Continued)*

Page

RECIPROCAL DISBARMENT BY THE PENNSYLVANIA SUPREME COURT WHERE THE ISSUES RAISED IN THE PETITION FOR WRIT OF CERTIORARI WERE NOT RAISED, ARGUED OR CONSIDERED IN THE DISCIPLINARY PROCEEDINGS BEFORE THE PENNSYLVANIA SUPREME COURT 12

VII. CONCLUSION 16

TABLE OF AUTHORITIES

Cases: Page

Attorney Grievance Commission of Maryland v. Michael Patrick Keehan, 311 MD. 161, 533 A.2d 278 (1987) 3

Cardinale v. Louisiana, 394 U.S. 437 (1969) 12

County of Sonoma v. Isbell, 439 U.S. 996 (1978) .. 11

Deal v. Cincinnati Board of Education, 402 U.S. 962 (1971) 11

Hart v. Coiner, 415 U.S. 938 (1974) 11

Heath v. Alabama, 474 U.S. 82 (1985) 12

Illinois v. Gates, 462 U.S. 213 (1983) 12

McGoldrick v. Compagnie Generals Transatlantique, 309 U.S. 430 (1940) 12

Snelling v. Radford, 243 U.S. 46 (1917) 15

State Farm Mutual Ins. Co. v. Duel, 324 U.S. 154, (1945) 12

Wallace v. Virginia, 392 U.S. 390 (1968) 12

Statutes

28 U.S.C. §1257(3) 2, 12

28 U.S.C. §2101(c) 1, 6, 8, 9, 10, 11, 16

Rules of Procedure

A. SUPREME COURT RULES

Rule 8 15

Rule 17 10

Rule 20.4 ..... 1, 6, 7, 9, 10, 16

Rule 21.1(h) 8, 9, 12, 13, 14

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

B. PENNSYLVANIA RULES

Pa. R.A.P. 2542(a) 2, 4, 5, 7, 9, 11

Pa.R.A.P. 2544(b) 5

Pa.R.D.E. 216. ..... 3, 7, 9, 12, 13, 14, 15

C. MISCELLANEOUS

Disciplinary Rule 1-101 2

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OCTOBER TERM, 1988

MICHAEL PATRICK KEEHAN,

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v.

OFFICE OF DISCIPLINARY COUNSEL OF THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

IV. COUNTER-STATEMENT ON JURISDICTION

The Petition for Writ of Certiorari, submitted by cover letter dated March 28, 1988, seeks the Court's review of the reciprocal disbarment of the Petitioner by the Order of the Supreme Court of Pennsylvania dated July 29, 1988. Under the provisions of 28 U.S.C. §2101(c) and Supreme Court Rule 20.4, the Petitioner had ninety days from July 29, 1988, or until October 27, 1988, during which to timely apply for a writ of certiorari *unless* he had *timely* petitioned the Supreme Court of Pennsylvania to reconsider the reciprocal disbarment

Order dated July 29, 1988. While the Petitioner did file a Petition for Reconsideration on or after August 22, 1988, it was not submitted within the fourteen day period provided for in Pennsylvania Rule of Appellate Procedure 2542. Rather, it was filed at least ten days out of time. The time during which the Petitioner could have *timely* filed an application for writ of certiorari, therefore, ran from the date of his disbarment and expired on October 27, 1988 – five months prior to its actual submission to your Honorable Court.

Additionally, because the Petitioner did not raise or argue any federal constitutional question respecting the Pennsylvania Rule of Disciplinary Enforcement which had been applied in the reciprocal discipline proceedings before the Pennsylvania Supreme Court, *none* of the Questions Presented for Review set forth in the Petition for Writ of Certiorari are properly before the Court for review under 28 U.S.C. §1257(3).

V. COUNTER-STATEMENT OF THE CASE

A. Maryland Disciplinary Proceedings

By Opinion and Order of the Court of Appeals of Maryland filed November 20, 1987, the Petitioner, M. Patrick Keehan (a/k/a Michael Patrick Keehan), was disbarred from the practice of law in the State of Maryland for deliberately failing to disclose material information in his application to the Maryland Bar, in violation of Disciplinary Rule 1-101. In essence, the Petitioner had fraudulently gained admittance to the Maryland Bar by falsely asserting that he had been regularly engaged in the practice of law in the Commonwealth of Pennsylvania as the principal means of earning his livelihood for at least five of the last seven years immediately preceding the filing of his petition for admission when, in fact, he had been employed full-time in Maryland in the non-legal position of a claims supervisor for an insurance company and his practice of law in

Pennsylvania had been minimal. *Attorney Grievance Commission of Maryland v. Michael Patrick Keehan,* 311 Md. 161, 533 A.2d 278 (1987).

B. Pennsylvania Reciprocal Disciplinary Proceedings

By letter dated December 22, 1987, Pennsylvania's Chief Disciplinary Counsel brought Petitioner's Maryland disbarment to the attention of the Pennsylvania Supreme Court. Pursuant to the provisions of Pennsylvania Rule of Disciplinary Enforcement 216 (Pa.R.D.E. 216) and by Order dated December 30, 1987, the Supreme Court of Pennsylvania directed the Petitioner to show cause within thirty days of service of the Order why imposition of identical or comparable discipline in the Commonwealth of Pennsylvania would be unwarranted.

By cover letter dated February 8, 1988, the Petitioner, through his counsel, Clyde W. Vedder, Esq., sent an ANSWER TO RULE TO SHOW CAUSE dated February 8, 1988 to the Pennsylvania Supreme Court. A copy of his Answer is attached as Annex "C" to the Petition. While his Answer raised and asserted various matters, it did not raise or argue any of the Questions Presented for Review now set forth in the Petition for Writ of Certiorari.

By cover letter dated February 12, 1988, the Respondent herein, the Office of Disciplinary Counsel, submitted DISCIPLINARY COUNSEL'S RESPONSE TO ANSWER TO RULE TO SHOW CAUSE. In essence, Disciplinary Counsel urged the Pennsylvania Supreme Court to disbar the Petitioner and deny his request that a hearing be scheduled to consider the issues *in mitigation* he purportedly raised in his Answer.

By cover letter dated March 23, 1988, more than thirty days after service of the Order of December 30,

1987, counsel for the Petitioner submitted a MEMORANDUM IN SUPPORT OF ANSWER TO RULE TO SHOW CAUSE. A copy thereof is attached as Annex "D" to the Petition. While his Memorandum asserted and argued various matters, it did not raise or argue any of the Questions Presented for Review now set forth in the Petition for Writ of Certiorari.

By cover letter dated March 29, 1989, Disciplinary Counsel submitted DISCIPLINARY COUNSEL'S RESPONSE TO RESPONDENT'S MEMORANDUM IN SUPPORT OF ANSWER TO RULE TO SHOW CAUSE. By cover latter dated April 26, 1988, Petitioner's counsel submitted a SUPPLEMENTAL MEMORANDUM to the Supreme Court of Pennsylvania where the Petitioner asserted and argued various matters, but did not raise or argue any of the Questions Presented for Review set forth in the Petition for Writ of Certiorari. Disciplinary Counsel did not file any responsive memorandum or brief.

By Order dated July 29, 1988, the Pennsylvania Supreme Court disbarred the Petitioner and denied his request for a hearing [in mitigation]. A copy of this Order is attached as Annex "A" to the Petition.

C. Petition for Reconsideration

Following the reciprocal disbarment Order of July 29,,1988, the Pennsylvania Rules of Appellate Procedure (Pa.R.A.P.) governed any further proceedings before the Pennsylvania Supreme Court. Under Pa.R.A.P. 2542(a), the Petitioner had a period of fourteen days within which to submit an application for reargument. The Pennsylvania Rules of Appellate Procedure do not provide separate provisions for "reconsideration" or "rehearing." Pa.R.A.P. 2542(a) provides:

> "An application for reargument shall be filed with the Prothonotary [of the Supreme Court of Pennsylvania] within 14 days after the entry of the judgment or other order involved."

The Petitioner did not file any application for reargument by August 12, 1988 — the fourteenth day following the Order of July 29, 1988. Rather, by cover letter dated August 24, 1988, Petitioner's counsel submitted a PETITION FOR RECONSIDERATION OF ORDER DATED JULY 29, 1988, which Petition for Reconsideration itself was dated August 22, 1988. A copy thereof was attached as Annex "E" to the Petition. While his untimely Petition for Reconsideration raised and argued various matters, it did not raise or argue any of the Questions Presented for Review now set forth in the Petition for Writ of Certiorari.

By cover letter dated August 30, 1988, Disciplinary Counsel submitted to the Pennsylvania Supreme Court DISCIPLINARY COUNSEL'S ANSWER TO THE RESPONDENT'S PETITION FOR RECONSIDERATION OF ORDER DATED JULY 29, 1988, contending, among other things, that it had been untimely filed under Pa.R.A.P. 2542(a). By cover letter dated December 2, 1988, Petitioner's counsel submitted to the Supreme Court of Pennsylvania a BRIEF IN SUPPORT OF PETITION FOR RECONSIDERATION wherein he raised and argued various matters, but did not raise or argue any of the Questions Presented for Review set forth in the Petition for Writ of Certiorari. Disciplinary Counsel did not submit any reply brief since Pa.R.A.P. 2544(b) does not allow the submission of a supporting brief in applications for reargument matters. Pa.R.A.P. 2544(b) provides:

> "No Supporting Brief. All contentions in support of an application for reargument shall be set forth in the body of the application as prescribed by Paragraph (a)(3) of this rule. No separate brief in support

> of an application for reargument will be received, and the prothonotary of the appellate court will refuse to file any application for reargument to which is annexed or appended any supporting brief."

By Order dated December 28, 1988, the Pennsylvania Supreme Court denied the PETITION FOR RECONSIDERATION OF ORDER DATED JULY 29, 1988. A copy of the Court's Order of December 28, 1988 is attached as Annex "B" to the Petition. Exactly ninety days thereafter, by cover letter dated March 28, 1989, counsel for the Petitioner submitted his PETITION FOR A WRIT OF CERTIORARI. Disciplinary Counsel, the Respondent herein, received its copy on March 30, 1989 in an envelope *postmarked* March 29, 1989.

D. Petition for Writ of Certiorari

The time for filing a petition for writ of certiorari is statutorily established in 28 U.S.C. §2101(c) which provides:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

Supreme Court Rule 20.4 provides a limited exception where a *timely* petition for rehearing was filed in the court below:

> "However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (. . .) runs from the date of the denial of rehearing. . . ."

On Page 1 of his Petition, the Petitioner lists his Questions Presented For Review as follows:

"1. Is the Pennsylvania Rule of Disciplinary Enforcement, Rule 216 (Pa.R.D.E. 216) constitutionally infirm and violative of due process and equal protection of law?

2. Is Pa.R.D.E. 216 void for vagueness?

3. Does Pa.R.D.E. 216 fail to accord a lawyer an opportunity to be heard?

4. Did the Supreme Court of Pennsylvania fail to state reasons for its decision by not issuing an opinion and does Pa.R.D.E. 216 fail to require such a statement?"

Under the heading "VI. JURISDICTION" (on Page 6), the Petitioner *inaccurately* claims: "A *timely* petition for reconsideration, i.e. rehearing, was denied on December 28, 1988" and that the time for filing a Petition for Writ of Certiorari ". . . runs from the date of the denial of rehearing." (Emphasis added). However, the Petitioner's PETITION FOR RECONSIDERATION OF ORDER DATED JULY 29, 1988 was *not* timely filed under Pa.R.A.P. 2542(a) and, therefore, the time for filing a petition for writ of certiorari was not extended under Supreme Court Rule 20.4.

Under the heading "IX. STATEMENT OF CASE," the Petitioner *inaccurately* asserts, at Page 11 and 12:

> *"In his pleadings, your Petitioner raised the first three issues articulated in questions presented hereinabove* to the effect that said Rule [Pa.R.D.E. 216] was constitutionally infirm and violative of due process and equal protection of law in that it was impermissibly vague as to the procedures to be followed to effectuate reciprocal discipline and it failed to accord a respondent/attorney a proper opportunity to be heard." (Emphasis added).

Further, the Petitioner *inaccurately* asserts, at Page 12:

> ". . . your Petitioner filed a *Petition for Reconsideration realleging the foregoing federal and constitutional questions* and further articulating the failure of The Supreme Court of Pennsylvania to follow said Rule." (Emphasis added).

Finally, the Petitioner asserts, at Page 12:

> "In addition, your Petitioner *now further alleges* that The Supreme Court of Pennsylvania failed to state any reasons for its decision to allow a determination to be made as to the basis of the entry of the order which it made." (Emphasis Added)

Supreme Court Rule 21.1(h) required the Petitioner to set forth in his Statement of the Case:

> ". . . the stage in the proceedings, . . . , at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (. . .) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

The Petitioner has failed to comply with these requirements and, under the circumstances, cannot comply with them.

VI. SUMMARY OF ARGUMENT

The Court should not grant certiorari to review the Petitioner's reciprocal disbarment by the Supreme Court of Pennsylvania because the Petitioner has not timely filed his Petition for Writ of Certiorari under 28 U.S.C. §2101(c) and Supreme Court Rule 20.4 and because the Petitioner has not preserved any federal constitutional issues for review. Despite the Petitioner's assertions that

his Petition for Reconsideration was "timely" filed with the Pennsylvania Supreme Court and that his pleadings in the reciprocal disciplinary proceedings raised his various claims that Pa.R.D.E. 216 is violative of constitutional protections, review of Pa.R.A.P. 2542(a) and the various documents attached by the Petitioner to his Petition for Writ of Certiorari establishes that his claims are baseless.

Under Pa.R.A.P. 2542(a), the Petitioner had fourteen days from July 29, 1988 within which to "timely" submit an application for reargument. His PETITION FOR RECONSIDERATION OF ORDER OF JULY 29, 1988 is not even dated until August 22, 1988 and was submitted at some time thereafter. It was filed with the Pennsylvania Supreme Court out of time and did not extend the time period under 28 U.S.C. §2101(c) and Supreme Court Rule 20.4 within which to seek a writ of certiorari. His Petition for Writ of Certiorari was not submitted until March 28, 1989 (at the earliest) – five months after the ninety day period had expired on October 27, 1988.

Under Supreme Court Rule 21.1(h), the Petitioner was required to specify at what stage of the proceedings in the Supreme Court of Pennsylvania he had raised the federal questions he now seeks to have reviewed, the manner of his raising them and the way in which they were passed upon by the Pennsylvania Supreme Court. He did not and cannot do so since he never raised or argued before the Pennsylvania Supreme Court any of the Questions Presented for Review set forth in his Petition for Writ of Certiorari. As a consequence, the Pennsylvania Supreme Court has not ruled on any constitutional issue in this case. No federal constitutional issue is properly before the Court for review.

VII. ARGUMENT

Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. Supreme Court Rule 17. Where a petitioner fails to timely seek review under the applicable federal statute and Supreme Court Rule and fails to raise or preserve for review any federal constitutional issue, the Court should deny certiorari.

A. THE COURT SHOULD DENY CERTIORARI TO REVIEW THE PETITIONER'S RECIPROCAL DISBARMENT BY THE SUPREME COURT OF PENNSYLVANIA WHERE THE PETITIONER'S PETITION FOR RECONSIDERATION TO THE SUPREME COURT OF PENNSYLVANIA WAS NOT TIMELY FILED AND HIS PETITION FOR WRIT OF CERTIORARI WAS NOT FILED WITHIN NINETY DAYS OF THE ORDER OF DISBARMENT.

Under the provisions of 28 U.S.C. §2101(c), the Petitioner had a period of ninety days from the Pennsylvania Supreme Court's Order of July 29, 1988 within which to file his Petition for Writ of Certiorari. That period of time expired on October 27, 1988. Rule 20.4 of the Supreme Court Rules provides a limited exception to the date the ninety day period begins to run. Under that Rule, where a petition for rehearing is *timely* filed by any party in the case, then the time for filing a petition for writ of certiorari runs from the date of the denial of rehearing or the entry of a subsequent judgment entered on rehearing. In this case, the Petitioner did file a Petition for Reconsideration with the Pennsylvania Supreme Court but, despite his assertion in his Petition for Writ of Certiorari (Pet. 6), it was not "timely" filed.

While the Petitioner did not set forth the date on which he filed his Petition for Reconsideration, he attached a copy as Annex "E" to his Petition for Writ of

Certiorari. The document itself bears the date of August 22, 1988 and could not have been filed until that date or thereafter. In fact, it was submitted to the Prothonotary of the Pennsylvania Supreme Court by cover letter dated August 24, 1988.

Rule 2542 of the Pennsylvania Rules of Appellate Procedures (Pa.R.A.P.) governs the time and manner of seeking reargument (or reconsideration) of judgments and orders of the Pennsylvania Supreme Court and, as to time, provides:

> "(a) Time. An application for reargument shall be filed with the Prothonotary within 14 days after entry of the judgment or order involved."

The Pennsylvania Supreme Court's Order was dated July 29, 1988 and the Petitioner had fourteen days from that date during which to timely file an application for reargument. He had until Friday, August 12, 1988. However, his Petition for Reconsideration is even dated ten days past that date and was not, in fact, "timely" filed.

Since the Petitioner did not timely file a petition for rehearing with the Pennsylvania Supreme Court, the time for timely filing a petition for writ of certiorari did not run from the date the Pennsylvania Supreme Court denied his request for reconsideration. Rather, it ran from the date of the disbarment Order dated July 29, 1988. Since the Petitioner did not timely file a petition for reargument with the Pennsylvania Supreme Court, his Petition for Writ of Certiorari was due within ninety days of July 29, 1988 – or, by October 27, 1988. He did not actually submit his Petition for Writ of Certiorari until March 28, 1989 – five months out of time.

Since the Petitioner's Petition for Writ of Certiorari was submitted five months beyond the time statutorily established by 28 U.S.C. §2101(c), the Court should deny review. *County of Sonoma v. Isbell,* 439 U.S. 996 (1978); *Hart v. Coiner,* 415 U.S. 938 (1974); *Deal v.*

Cincinnati Board of Education, 402 U.S. 962 (1971); *Wallace v. Virginia,* 392 U.S. 390 (1968).

B. THE COURT SHOULD DENY CERTIORARI TO REVIEW THE PETITIONER'S RECIPROCAL DISBARMENT BY THE PENNSYLVANIA SUPREME COURT WHERE THE ISSUES RAISED IN THE PETITION FOR WRIT OF CERTIORARI WERE NOT RAISED, ARGUED OR CONSIDERED IN THE DISCIPLINARY PROCEEDINGS BEFORE THE PENNSYLVANIA SUPREME COURT.

Under 28 U.S.C. §1257(3), this Court has jurisdiction to review the final judgment of the Pennsylvania Supreme Court where that judgment involved the denial of any federal constitutional right or privilege. However, where the alleged infringement of a constitutional right or privilege was not raised, argued or considered in the proceedings below, your jurisdiction (if it exists) should not be exercised. *Heath v. Alabama,* 474 U.S. 82 (1985); *Illinois v. Gates,* 462 U.S. 213 (1983); *Cardinale v. Louisiana,* 394 U.S. 437 (1969); *State Farm Mutual Ins. Co. v. Duel,* 324 U.S. 154 (1945); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430 (1940).

For this Court to review a state court judgment on writ of certiorari, the federal questions sought to be reviewed should have been timely and properly raised in the state court proceedings. Supreme Court Rule 21.1(h) requires a petitioner to set forth in his petition for writ of certiorari the stage of the proceedings where the federal questions were raised, the method and manner or raising them, and how they were passed upon by the court, with specific references to the places in the record where the matters appear.

In his Petition for Writ of Certiorari, the Petitioner lists four Questions Presented for Review. The first three imply that Pa.R.D.E. 216 is "constitutionally infirm and

violative of due process and equal protection lf law," is "void for vagueness," and does not "accord a lawyer an opportunity to be heard." The fourth question implies that the Petitioner had some right to have the Pennsylvania Supreme Court issue an opinion along with its Order disbarring the Petitioner so that he could be sure the Court correctly considered the relevant evidence, applied the applicable law, and exercised sound discretion.

In an apparent attempt to establish jurisdiction under Rule 21.1(h), the Petitioner, in his Statement of Case (Pet. 11-12,) states:

> "*In his pleadings* [with the Pennsylvania Supreme Court], *your Petitioner raised the first three issues articulated in questions presented hereinabove* to the effect that said Rule [Pa.R.D.E. 216] was constitutionally infirm and violative of due process and equal protection of law in that it was impermissibly vague as to the procedures to be followed to effectuate reciprocal discipline and it failed to accord a respondent/attorney a proper opportunity to be heard. The Supreme Court of Pennsylvania entered its Per Curiam Order of disbarment on July 29, 1988. Thereafter, *your Petitioner filed a Petition for Reconsideration realleging the foregoing federal and constitutional questions* and further articulating the failure of The Supreme Court of Pennsylvania to follow said Rule." (Emphasis added)

In fact, however, the Petitioner did not raise any such federal constitutional questions in any of his pleadings or briefs to the Pennsylvania Supreme Court. Review of his ANSWER TO RULE TO SHOW CAUSE (Annex "C" to his Petition), his MEMORANDUM IN SUPPORT OF ANSWER TO RULE TO SHOW CAUSE (Annex "D"), and his PETITION FOR RECONSIDERATION OF ORDER DATED JULY 29, 1988 (Annex "E") reveals the inaccuracy, if not the outright falsehood, of his

above quoted statements. Not once do the words "due process," "equal protection," "void for vagueness," or "constitutional rights" appear in any of those documents. In fact, he did not raise or argue to the Pennsylvania Supreme Court that Pa.R.D.E. 216 was "constitutionally infirm and violative of due process and equal protection of law." He did not, in fact, raise or argue to the Pennsylvania Supreme Court that Pa.R.D.E. was "void for vagueness."

While his ANSWER TO RULE TO SHOW CAUSE did conclude by asking the Pennsylvania Supreme Court to schedule a hearing in mitigation (Annex "C" at Page 6), which request was denied (Annex "B"), the Petitioner never raised any claim that he was constitutionally entitled to a hearing or that the Pennsylvania Supreme Court's denial of his request for a mitigation hearing infringed on any constitutionally protected right or privilege.

Since the Petitioner did not, in fact, raise or argue any constitutional issue in the proceedings before the Pennsylvania Supreme Court, that Court could not and did not rule on any such issue. The Petitioner did not and could not comply with the requirements of Supreme Court Rule 21.1(h) because he did not, in fact, raise his first three Questions Presented for Review in the proceedings before the Pennsylvania Supreme Court.

With regard to the Petitioner's fourth issue (that Pa.R.D.E. 216 does not require and the Pennsylvania Supreme Court did not issue an Opinion expressing its reasons for disbarring the Petitioner), his Petition for Writ of Certiorari seems to admit that this issue is now being raised for the first time. In his Statement of Case (Pet. 12), the Petitioner asserts:

> "In addition, your Petitioner *now further alleges,* that The Supreme Court of Pennsylvania failed to

> state any reasons for its decision to allow a determination to be made as to the basis for the entry of the order which it made." (Emphasis added).

Since the Petitioner did not raise or argue to the Pennsylvania Supreme Court that he had a constitutional right to an opinion from that Court explaining its decision, that claim should not be considered on writ of certiorari. While The Respondent too would have liked the Pennsylvania Supreme Court to have issued an opinion in this case, as well as in most disciplinary cases, there is no requirement, constitutional or otherwise, that the Pennsylvania Supreme Court do so. Pa.R.D.E. 216, similar to this Court's own reciprocal disciplinary rule – Rule 8, merely provides that, following the issuance of a rule to show cause, the court issue an "appropriate order." Pa.R.D.E. 216 also sets forth the factors which can be considered, which factors are fully in accord with those established by this Court in *Snelling v. Radford,* 243 U.S. 46 (1917).

Since the Petitioner did not, in fact, raise or argue to the Pennsylvania Supreme Court any of the four Questions Presented for Review listed in his Petition for Writ of Certiorari, none of those issued are properly before this Court for consideration and his Petition for Writ of Certiorari should be denied.

VIII. CONCLUSION

Since the Petition for Writ of Certiorari was not timely filed under the provisions of 28 U.S.C. §2101(c) and Supreme Court Rule 20.4, in that the Petition was taken from the denial of an untimely petition for reconsideration, and since the Petitioner did not raise in the Pennsylvania Supreme Court any of the issues he now seeks to be reviewed on writ of Certiorari, the Court should deny certiorari in this matter.

Respectfully Submitted,

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